84-1660

No. .....

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JACK K. MOORE,

Petitioner,

v.

CITY OF CHARLOTTE, etc., *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

LOUIS L. LESESNE, JR.
Gillespie & Lesesne
Suite 980
United Carolina Bank Building
212 South Tryon Street
Charlotte, North Carolina 28281
(704) 372-5700

J. LEVONNE CHAMBERS
RONALD L. ELLIS
ERIC SCHNAPPER*
NAACP Legal Defense &
Educational Fund, Inc.
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

Counsel for Petitioner

*Counsel of Record

81pp

QUESTIONS PRESENTED *

1. Did the court of appeals exceed its authority under Rule 52, F.R.C.P., by overturning the credibility determinations of the trial judge?

2. Did the court of appeals exceed its authority under Rule 52, F.R.C.P., by reversing the trial court's factual findings of discrimination?

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* The Fourth Circuit decision in this case was issued prior to this Court's opinion in Anderson v. City of Bessemer City, No. 83-1623, which directly addressed the proper scope of appellate review of credibility determinations, and which concluded that the Fourth Circuit "misapprehended ... the clearly erroneous standard." (Slip opinion, p.1). We suggest that the decision in this case be vacated and remanded for further consideration in light of Anderson.

PARTIES

The parties to this proceeding are Jack K. Moore and the City of Charlotte, North Carolina.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Jack K. Moore respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in the proceeding on January 28, 1985.

OPINIONS BELOW

The decision of the court of appeals, which is not yet reported, is set out at pp. 1a-38a of the Appendix. The district court's Findings of Fact and Conclusions of Law, which are not reported, are set out at pp. 39a-52a of the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1985. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE AND RULES INVOLVED

Section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e-2(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer -

> (1) to ... discriminate against any individual with respect to his compensation, terms, condition, or privileges of employment, because of such individual's race, color, religion, sex, or national origin....

Rule 52(a), Federal Rules of Civil Procedure, provides in pertinent part:

> In all actions tried upon the facts without a jury ... the court shall find the facts specially and state separately its conclusions of law thereon.... Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses....

STATEMENT OF THE CASE

In 1978 police officials in Charlotte, North Carolina, concluded that several officers had been involved in unrelated efforts to influence the disposition of traffic tickets. No disciplinary measures of any kind were

imposed on any of the four other officers involved. Petitioner, one of the few black supervisors on the police force, was suspended without pay for 85 days and then demoted from sergeant to patrolman. No white officer in the City of Charlotte had ever been disciplined in any way for the conduct which petitioner candidly acknowledged, and no white officer had ever been demoted for any other offense of any kind. Petitioner brought this action under Title VII of the Civil Rights Act of 1964, alleging that the unprecedentedly severe sanction imposed on him was the result of racial discrimination.

The nature of the misconduct which was the purported basis for petitioner's demotion is not in dispute. In the fall of 1977 a private citizen named Eddie Drakeford was arrested for driving while under the influence of alcohol. Petitioner, who was an acquaintance of

Drakeford, requested two other officers, Grose and Cureton, to "help" Drakeford (4a). Petitioner did not ask Grose or Cureton to take any improper action; indeed, he did not suggest that they take any specific action at all. Petitioner neither received money or anything of value from Drakeford, nor did he make any such offer to either Grose or Cureton. Petitioner candidly acknowledged the nature of his action as soon as he was asked about it by his supervisors. In March 1978 the Charlotte police chief suspended petitioner and filed charges against him with the city Civil Service Commission.[1] In June 1978 the commission

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[1] The police chief also charged petitioner with bribery. The individual alleged to have bribed petitioner, Buddy Patterson, had been acquitted of a criminal charge of bribery in February 1978, one month before administrative charges were brought against petitioner. Petitioner was subsequently criminally prosecuted for bribery, despite the earlier acquittal of the alleged bribe payer, but that prosecution was dismissed with prejudice for lack

found petitioner guilty of the conduct which he had acknowledged from the outset, ordered him demoted from sergeant to patrolman, and suspended him without pay for 85 days.

Petitioner commenced this action in August, 1982, alleging that his demotion was the result of racial discrimination. Petitioner advanced two specific factual claims at trial. First, he alleged that when white officers were charged with similar misconduct it was the practice of the city neither to investigate nor discipline those officers. Second, he asserted that white officers accused of equally or more serious offenses had either not been disciplined at all, or had been disciplined less harshly. Petitioner

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of evidence. (App. 6a). The Civil Service Board also rejected the administrative allegation that petitioner had accepted a bribe.

alleged that no white officer had ever been demoted by the city under any circumstances.

The trial judge ruled in favor of petitioner on each of these factual issues. With regard to previous demotions, the judge concluded:

> No white sergeant found guilty of a rules violation has ever been demoted by the Board. (46a).

The trial court found that the actions with which petitioner was charged had not in the past been treated as serious misconduct:

> White officers who committed violations similar to those committed by plaintiff not only were not prosecuted before the Board, but were not disciplined at all. (43a).

Finally, the court held that the penalty imposed on petitioner was excessive when compared to the misconduct for which whites had in the past been disciplined:

> [A] number of white police sergeants have been found guilty by the Board of violations of severity comparable to those committed by plaintiff, but have received much milder punishment than that imposed on plaintiff.... Defendant has not articulated any explanation for the difference in severity of the punishment imposed on plaintiff by the Board and that imposed on white sergeants found to have violated the Civil Service Rules. (45a-46a).[2]

Based on these subsidiary factual findings, the district court concluded that petitioner had been demoted because of his race. (49a).

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[2] See also 50a. ("[A] black employee was demoted and suspended for 85 days while similarly situated whites either received much lighter discipline or went unpunished").

The court of appeals disagreed with each of the trial judge's factual findings. The appellate court acknowledged that finding that no sanctions had ever been imposed on white officers guilty of the same conduct with which petitioner was charged. The appellate court disagreed, however, with the trial judge's evaluation of the severity of the offenses of which whites had been guilty (32a-36a). The court of appeals acknowledged that no white officer in the history of Charlotte had ever been demoted, but insisted that petitioner's demotion was entirely warranted. (33a). The appellate court therefore concluded that the district court finding of intentional discrimination was "clearly erroneous" (36a).

REASONS FOR GRANTING THE WRIT

The Fourth Circuit's January 1985 opinion in this case presents the same problem of appellate review of trial court credibility determinations which was resolved by this Court's subsequent decision in Anderson v. City of Bessemer City, No. 83-1623 (March 19, 1985). The Fourth Circuit, writing prior to this Court's decision in Anderson, gave no deference to the trial court credibility determinations in this case. Anderson has now condemned that appellate practice, holding that a trial judge's credibility assessments are often virtually conclusive:

> When findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding

> of and belief in what is said. Wainwright v. Witt, 469 U.S. ____ (1985).... [W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error. (Slip opinion, p.10).

In the instant case, the court of appeals, acting without the advantage of this Court's decision in Anderson, gave little heed to the trial judge's findings regarding which of the witnesses was to be believed.

In this case, as in Anderson, the trial court's credibility assessment played a key role. In light of the fact that it was the practice of the city not to file administrative charges against white officers alleged to have attempted to influence the disposition of traffic offenses, petitioner complained at trial

that the mere decision to pursue such charges against him was itself discriminatory. The defendant relied on testimony that charges were pressed against petitioner, not because he had sought to exercise such influence, but solely because the city mistakenly believed that petitioner had accepted a bribe to do so. (44a). The district judge who heard that testimony concluded that the reason articulated was a "sham" (44a) and that the defendants had "failed credibly to articulate a legitimate reason" for their action. (46a) (Emphasis added). Despite the credibility assessment inherent in the trial judge's express finding, the appellate panel made its own assessment and concluded that the decision to press charges against petitioner was not racially motivated. (29a-31a).

This Court's decision in Anderson concluded that in that case "the Court of Appeals misapprehended and misapplied the clearly erroneous standard." (Slip opinion, p.1). The instant case was decided by the same Court of Appeals at a time when the mistaken Fourth Circuit opinion in Anderson was the controlling law of the circuit in that court of appeals. One of the appellate judges in the instant case served on the panel in Anderson. The court of appeals panel in this case, not surprisingly, engaged in precisely the sort of de novo fact finding that it had utilized barely a year earlier in the ill-conceived panel decision in Anderson itself.

The circumstances of this case present a straightforward factual dispute. In 1978 petitioner and several white officers were found to have attempted to influence the handling of traffic viola-

tions. No disciplinary measures of any kind were taken against the whites; petitioner, on the other hand, was suspended for 85 days and demoted. No white officer had previously been demoted for any reason. The central issue at trial was whether this apparently dissimilar treatment was the result of racial discrimination or of some legitimate consideration. The trial judge concluded that petitioner was demoted and suspended as a result of racial discrimination.

The critical subsidiary factual findings of trial judge were that "[w]hite officers who committed violations similar to those committed by plaintiff ... were not disciplined at all" (43 a) and that "much milder punishment" had been imposed on whites guilty of "violations of severity comparable to those committed by plaintiff." (45 a). Under the standard of review established by this Court, and

applied in other circuits, these findings should have been upheld if supported by substantial evidence. See Pullman-Standard v. Swint, 456 U.S. 273 (1982). The record in this case was clearly sufficient to meet that standard. Police officials concluded that at several whites were guilty of the same conduct as petitioner and should be disciplined, yet none of those whites were disciplined in any way. (21a, 23a).[3] The record also showed that whites had consistently been subjected to only temporary suspensions for misconduct at least as serious as that for which petitioner was permanently demoted:

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[3] The Fourth Circuit itself conceded that one of those whites "had violated police regulations by voiding two traffic tickets for friends and by fraudulently securing prosecutorial dismissal of one traffic case." (21a).

Offense	Sanction Imposed on White Officer
Possession of heroin	60 day suspension[4]
Defrauding the city	30 day suspension[5]
Defrauding the city	10 day suspension[6]
Suggesting bombing of building	10 day suspension[7]
Compelling man to pay prostitute	2 day suspension[8]
Falsifying police report	10 day suspension[9]
Assaulting civilian	20 day suspension[10]

[4] J.A. 103-04.

[5] J.A. 102-04.

[6] J.A. 191, 194-197.

[7] J.A. 118.

[8] J.A. 121.

[9] J.A. 167.

[10] J.A. 199, 201.

While reasonable judges might disagree about some of the details of these incidents, clearly the evidence was sufficient to sustain the judgment of the district court under the limited standard of review contemplated by Rule 52. But here, as in Anderson, the Fourth Circuit proceeded to make its own assessment of the evidence, rather than to defer to the assessment made by the trial court.[11]

The extent to which the appellate panel disregarded the role of the district court under Rule 52 is highlighted by the fact that here, as in Anderson, the court of appeals "sustained" a factual defense which had neither been offered by the defendants at trial nor suggested by them on appeal. Throughout these proceedings both plaintiff and defendant have agreed

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[11] 2a (trial court mistakenly "equated greater and lesser offenses"), 34a (demotion "consistent" with punishment imposed on whites.)

that the severity of the offense with which petitioner and white officers had been charged was to be assessed on the basis of the nature of the conduct involved. The only explanation ever offered by the defense for the more lenient treatment of the white officers was that their misconduct simply was not as serious as petitioner's.

In its opinion the court of appeals simultaneously "articulated", assessed and sustained a completely new explanation for the defendant's conduct. In the view of the court of appeals, the gravity of the misconduct of black and white officers was to be weighed solely with reference to the section of the Civil Service Rule under which they were charged, not the actual conduct involved. (25a-27a). Thus if three whites and one black were guilty of seeking to influence the disposition of traffic offenses, but charges were filed

only against the black, the decision to discipline only the black would be self-justifying, since he alone was actually charged with violating a Civil Service Rule. In this case petitioner was charged with violating two rules that had never before been invoked against a single white officer (33a); in the Fourth Circuit's view that made petitioner's case so unique that no comparison with white officers was appropriate. (35a). Much of the appellate panel's opinion is devoted to an analysis of the various Civil Service Rules under which petitioner had been charged.[12]

[12] Similarly, the sole reason adduced at trial for pressing charges against petitioner before the Civil Service Commission was that the city believed him guilty of bribery, despite the recantation of the only witness against him. (44a). On appeal the Fourth Circuit articulated and upheld a very different reason, the pendency of the remaining charges of seeking to influence the charges against Drakeford. (29a-31a). But that simply was not the explanation given by the defense witness at trial.

Whatever the probative value of this explanation, it is an explanation for which all credit belongs to the court of appeals. None of the defense witnesses ever suggested that the differing treatment of black and white officers was due to their being charged under different rules. None of the defense witnesses even referred to the Civil Service Rules relied on by the Fourth Circuit. Neither in its arguments in the district court, nor in its lengthy appellate brief, did counsel for the city advance this explanation or even mention the Civil Services Rules. Thus while the Fourth Circuit complained that the trial judge had "ignored the department's own classification of disciplinary offenses" (3a), it is clear that the trial judge did so because the defendant itself attached no importance to those classifications.

The Fourth Circuit practice of sustaining on appeal factual defenses never adduced at trial circumvents the commands of Rule 52 far more effectively than the practice condemned in Anderson and Pullman Standard Co. v. Swint. If appellate courts are at liberty to consider factual contentions never presented at trial, there will be no need to defer to the findings of the trial judge, since the trial judge will not be given any opportunity to consider or rule on those contentions. In this case the Fourth Circuit did not purport to claim that the district judge had committed "clear error" in rejecting the Civil Service Rule explanation, since that explanation had never been offered at trial, the district judge had never passed on it, and there were no factual findings to review. Thus once the appellate panel undertook to consider a factual defense

never presented at trial, it regarded itself as free to disregard completely the limitations of Rule 52, and to make its own factual findings unencumbered by any need to defer to the views of the judge who heard the case at trial. If such a practice were permissible, the district courts would be stripped of any role in the fact finding process, and Rule 52 would be a dead letter.

CONCLUSION

For the above reasons the Court should grant the petition, vacate the decision of the court of appeals, and remand the case for further consideration in light of Anderson v. City of Bessemer City.

Respectfully submitted,

LOUIS L. LESESNE, JR.
Gillespie & Lesesne
Suite 980
United Carolina Bank Building
212 South Tryon Street
Charlotte, North Carolina 28281
(704) 372-5700

J. LEVONNE CHAMBERS
RONALD L. ELLIS
ERIC SCHNAPPER *
NAACP Legal Defense &
Educational Fund, Inc.
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

COUNSEL FOR PETITIONER
* COUNSEL OF RECORD

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-1430

JACK K. MOORE,

Appellee,

versus

CITY OF CHARLOTTE, NORTH CAROLINA,

Appellant,

and

CHARLOTTE POLICE DEPARTMENT,

Defendant.

Appeal from the United States
District Court for the Western District
of North Carolina, at Charlotte.
James B. McMillan, District Judge.
(C/A 82-0495-M)

Argued: October 29, 1984
Decided: January 28, 1985

Before
WIDENER, PHILLIPS and WILKINSON,
Circuit Judges.

F. Douglas Canty, Office of the City Attorney for Appellant; Louis L. Lesesne, Jr. (Gillespie & Lesesne on brief) for Appellee.

WILKINSON, Circuit Judge:

The city of Charlotte, North Carolina suspended police officer Jack K. Moore and demoted him in rank from a sergeant to a patrolman. According to city officials, the action was a legitimate exercise of disciplinary authority. According to Moore, the action was an unlawful exercise in racial discrimination. On this appeal, we examine the means by which Moore may prove his claim and we review the conclusion of the district court that Moore in fact did prove his claim. Because we find that conclusion to be clearly erroneous, we reverse.

In this case the district court erred in its evaluation of disciplinary violations within the department of police. It equated greater and lesser offenses in a manner that would discourage a department from acting on the reasonable belief of

corruption in its midst. In addition, the district court ignored the department's own classification of disciplinary offenses in its assessments of comparable seriousness. These failures together rendered meaningless the requirement of dissimilar sanctions for similar offenses that constitutes a prima facie case of racial discrimination in a Title VII disciplinary case. See McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 283 n. 11 (1976).

I

On September 11, 1977, Officers D. L. Grose and C. C. Leebrick of the Charlotte Police Department arrested Eddie Winfield Drakeford for driving while under the influence of alcohol. Before the scheduled date of Drakeford's trial, December 9, 1977, Sergeant Jack Moore

asked Officer Grose and Officer Ronald Cureton to "help" Drakeford with his case. Cureton subsequently spoke to two witnesses who were essential to the prosecution of Drakeford, attempting to dissuade them from testifying. When neither of the witnesses appeared for trial, Cureton requested the assistant district attorney to drop the charge because the state could not prove its case. The action against Drakeford was accordingly dismissed.

The conduct of Moore and Cureton came quickly to the attention of Major Samuel H. Killman, then commander of the Internal Affairs Division of the Charlotte Police Department, and Killman began to investigate the dismissal of the Drakeford case. When Killman first interviewed Moore on December 16, 1977, Moore admitted that he had contacted the two officers and acknowledged that his actions violated department regulations. The fact of

Moore's improper interference was not at that time, and has never been, a disputed issue. The motivation for Moore's improper interference, however, was a less clear question during Killman's investigation. Moore maintained that he had acted solely because of his longtime personal friendship with Drakeford. But Buddy Patterson, a mutual acquaintance of Moore and Drakeford, stated to Major Killman and two other police officers that Drakeford had paid Patterson $450 to help with the ticket, that Patterson had enlisted the aid of Moore, and that Patterson had given the money to Moore when the charge against Drakeford was dismissed.

Allegations of bribery added a new dimension to the case of the Drakeford traffic ticket, expanding the investigation from an internal disciplinary matter to a possible criminal prosecution. This criminal component culminated with trial

of Patterson, Cureton and Moore. In the joint trial of Patterson and Cureton in February 1978, the judge of the Superior Court of Mecklenburg County granted a non-suit motion for both defendants on the charge of bribery, and the jury acquitted both defendants on charges of conspiracy to commit bribery. In the trial of Moore in May 1978, the prosecution voluntarily dismissed its case with prejudice when Patterson disavowed the allegations of bribery that he had made to the police investigators.

Meanwhile, in the departmental investigation, the authority to act on Killman's findings lay initially with J. C. Goodman, then chief of the Charlotte Police Department. Under the Charlotte city charter, Goodman could act in three ways: he could end all disciplinary proceedings without punishing Moore, he could order punishment for Moore to the

extent of a thirty-day suspension without pay, or he could cite Moore to the Charlotte Civil Service Commission. If Goodman cited Moore to the Commission, that board would hold a hearing, make factual findings, and decide the punishment of Moore, which could include any suspension, demotion, or dismissal.

On March 29, 1978, Goodman suspended Moore without pay and referred his case to the Commission for final disposition. In his citation, Goodman charged Moore with four violations of Civil Service rules and regulations: conspiracy to dismiss the Drakeford case in return for a bribe, influencing of a government official in a matter relating purely to personal advantage, conduct unbecoming an officer, and interference with the proceedings of a trial. On June 21, 1978, the Commission found Moore to be not guilty of the first charge but guilty of the other three

charges. The suspension without pay that had begun on March 29 was made effective through June 21, and Moore was demoted from a sergeant to a patrolman.

After appealing the decision of the Commission in North Carolina state court, Moore -- who is a black man -- complained to the Equal Employment Opportunity Commission that the actions of Chief Goodman and of the Charlotte Civil Service Commission were motivated by unlawful racial discrimination. The EEOC notified Moore of his right to sue on May 28, 1982, and Moore filed the present action in the District Court for the Western District of North Carolina on August 25, 1982. The District Court held a bench trial on March 29 and March 30, 1983. In addition to a number of documentary exhibits, the evidence included the testimony of Moore, Cureton, Killman, and Mr. George Hager, to whom we shall return shortly. The court

entered its memorandum of decision on July 29, 1983. Finding that "defendant intentionally discriminated against plaintiff on the basis of his race," the court ordered the City of Charlotte to reinstate Moore as a sergeant and to repay his lost wages with prejudgment interest.[1] The city appealed to this court.

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[1] The city raised three other issues on this appeal: the adequacy of the EEOC right-to-sue letter, the responsibility of the city for the actions of the Civil Service Board, and the availability of prejudgment interest. The essence of the first claim is that the district court lacked subject-matter jurisdiction because Moore's right-to-sue letter was issued by the EEOC rather than by the Attorney General, the authority designated by Title VII for cases in which the defendant is a political subdivision of a state. 42 U.S.C. § 2000e-5(f)(1). We reject this argument under the reasoning of Perdue v. Roy Stone Transfer Corp., 690 F.2d 1091 (4th Cir. 1982), and Russell v. American Tobacco Co., 528 F.2d 357 (4th Cir. 1975), cert. denied, 425 U.S. 935 (1976). Entitlement to the letter, without actual receipt of it, is sufficient to support federal jurisdiction. Perdue, 690 F.2d at 1093. Moore's entitlement is unaffected by any EEOC assumption of Justice Department duties, as Moore may not be penalized for an EEOC failure to fulfill its statutory duties even if such a failure is

II

The decisive issue in this trial, a Title VII suit claiming racially disparate treatment, was the question of whether the defendant's disciplinary actions were motivated by Moore's race. 42 U.S.C. § 2000e-2(a). The district court's resolution of this issue was a finding of fact, Pullman-Standard v. Swint, 456 U.S. 273, 285-90 (1982), and may be reversed by this court only if the determination was "clearly erroneous" within the meaning of Fed.R.Civ.P. 52(a). Id. at 290. The "clearly erroneous" standard of review, as

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presented by the administrative division of responsibility between the EEOC and the Attorney General. Russell, 528 F.2d at 365.

Because we find reversible error in the district court's determination of liability, we do not reach the other two assignments of error.

we recently noted in discussing the import of Rule 52(a) for motivational issues in Title VII litigation

> may properly be based upon a conclusion that, without regard to that the 'actual' facts may be, the findings under review were induced by an erroneous view of the controlling legal standard; or are not supported by substantial evidence; or were made without properly taking into account substantial evidence to the contrary or are against the clear weight of the evidence considered as a whole. In sum, these establish that 'clearly erroneous' review is properly focused upon fact-finding processes rather than fact-finding results. the appellate function is to insure that the process shall have been principled; the function is not authoritatively to find the, 'facts' first instance, or to affirm or deny that the facts 'found' by the trial court are the 'actual' facts of the case.

Miller v. Mercy Hospital, 720 F.2d 356, 361 (4th Cir. 1983) (references omitted).

Applying this mandate, we are convinced that the fact-finding process in the court below was not properly principled. The appropriate fact-finding process in a Title VII suit for racially disparate treatment has been addressed by the Supreme Court many times. See especially McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983). These cases suggest several different ways in which a plaintiff may show, and a court may find, liability under Title VII. A plaintiff may prove the discriminatory intent of the defendant through direct evidence, by introducing statements of the defendant. Aikens, 460 U.S. at 714 n.3. Alternatively, a plaintiff may prove the discriminatory intent through circumstan-

tial evidence. The Court has provided explicit guidance for the order of proof and the allocation of burdens in such cases:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by the preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Burdine, 450 U.S. at 252-53 (citations omitted).

Moore offered no direct evidence of discriminatory intent held by any city officials. Proceeding exclusively through circumstantial evidence, he first faced the threshold Burdine burden of establish-

ing a prima facie case of discrimination. This burden, the Court has stated, "is not onerous." Id. at 253. To satisfy the requirement, Moore needed only to raise an inference that city officials acted with discriminatory intent. He might have done so through evidence of a general pattern of racial discrimination in the employment practices of the defendant. Reynolds v. Abbeville County School District No. 60, 554 F.2d 638, 642 (4th Cir. 1977). But Moore offered no evidence of any such pattern of discriminatory behavior by city officials. Moore might still have supported an inference of discriminatory intent, and discharged his prima facie burden, by eliminating the most common nondiscriminatory reasons for the disparate treatment. Burdine, 450 U.S. at 253-54. The Court in McDonnell Douglas described one model for making this sort of case, a model for plaintiffs who claim

to have been rejected in employment applications for discriminatory reasons. 411 U.S. at 802.

Moore is in a situation somewhat different from that of the McDonnell Douglas plaintiffs. He claims to have been the victim of a discriminatory disciplinary decision rather than a discriminatory hiring decision. As several courts have recognized, the McDonnell Douglas prima facie model is less useful in this context. See e.g. King v. Yellow Freight System, Inc., 523 F.2d 879, 882 (8th Cir. 1975); Burdette v. FMC Corporation, 566 F.Supp. 808, 814 (S.D.W.Va. 1983). The Court specifically anticipated this problem in McDonnell Douglas, noting that "the facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to

differing factual situations." 411 U.S. at 802 n.13. Although the particular elements of the McDonnell Douglas prima facie model are not apposite here, the purpose behind that model -- elimination of the most common nondiscriminatory reasons for the contested decision -- remains valid, and that purpose informs the construction of an appropriate model for disciplinary cases.

The most important variables in the disciplinary context, and the most likely sources of different but nondiscriminatory treatment, are the nature of the offenses committed and the nature of the punishments imposed. The purpose of the prima facie requirement is therefore served and the requirement met upon a showing (1) that plaintiff engaged in prohibited conduct similar to that of a person of another race, color, sex, religion, or national origin, and (2) that disciplinary

measures enforced against the plaintiff were more severe than those enforced against the other person. Cf. Burdette, 566 F.Supp. at 815. These variables, of course, do not exhaust the possible nondiscriminatory reasons for disparate treatment: establishment of a prima facie case is necessary, but not sufficient, in order for the plaintiff to prevail Furnco Construction Corp. v. Waters, 438 U.S. 567, 579-80 (1978). The defendant might yet advance a permissible rationale for treating the compared employees differently. As in Burdine, the defendant bears the burden of introducing such an explanation through evidence. 450 U.S. at 254-56. The defendant may not discharge its burden by merely restating the offense for which the plaintiff was disciplined; plaintiff must already have known this information in order to make a prima facie case. Defendant's burden is designed to

focus the contested issues at trial and to ensure the production of evidence available only to the defendant, such as insight into the discretionary factors underlying defendant's decision to discipline two individuals differently. See E. Bartholet, Proof of Discriminatory Intent Under Title VII: United States Postal Service Board of Governors v. Aikens, 70 California L. Rev. 1201, 1212-1219 (1982). If the defendant fulfills this obligation, the plaintiff must rebut the proffered explanation and meet the ultimate burden of proving intentional discrimination. Burdine, 450 U.S. at 256.

III

Applying the analytic framework described above to the evidence presented below, we can only conclude that Moore

failed to prove a prima facie case of racial discrimination. As previously noted, Moore offered no direct evidence of racially based intent in the disciplinary decisions, and he offered no evidence of a general pattern of racial bias in police department employment actions. His prima facie case rested entirely on an attempt to show that he had been treated less favorably than white officers who had committed similar misconduct. The district court accepted this contention in its findings of fact, noting

> 6(c). White officers who committed violations similar to those committed by plaintiff not only were not prosecuted before the Board, but were not disciplined at all.
>
> 9. ...a number of white police sergeants have been found guilty by the [Civil Service] Board of violations of severity comparable to those committed by plaintiff, but have received much milder punishment than that imposed on plaintiff.

These findings, however, rest on an unprincipled conception of "similarity" and "comparability," a structural flaw that renders the fact-finding process "clearly erroneous" under the reasoning of Miller v. Mercy Hospital, 720 F.2d 356, 361 (4th Cir. 1983). This error is best illustrated through close examination of each of the individual decisions that Moore claims to have been tainted by racial bias.

(a) **The Decision to Discipline Moore**

Plaintiff relied heavily at trial on his claim that chief Goodman had not taken any disciplinary action against white Charlotte police officers who were accused of interfering in the prosecution of traffic charges. To show the existence of such officers, plaintiff offered the testimony of Captain George Hager and a July 14, 1978 memorandum from Major Killman to Chief Goodman detailing

Killman's "Investigation of Alleged 'Ticket-Fixing.'" Hager, according to plaintiff's interpretation of the evidence, had violated police regulations by voiding two traffic tickets for friends and by securing prosecutorial dismissal of one traffic case. These incidents appeared in the Killman report along with similar anecdotes involving other officers and a brief conclusion that several rules violations were apparent. The staff committee reviewing Killman's investigation recommended that disciplinary action be taken against Hager and three other officers, but Goodman made no charges against any officer mentioned in the report.

In determining for purposes of Moore's prima facie case whether Goodman had as much cause to discipline Hager as he had cause to discipline Moore, we look first for illumination to the Supreme

Court decision in McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976). The Court there noted that "Of course, precise equivalence in culpability between employees is not the ultimate question: as we indicated in McDonnell Douglas, an allegation that other 'employees involved in acts against [the employer] of comparable seriousness . . . were nevertheless retained . . . is adequate to plead an inferential case . . . ." Id. at 283 n. 11 (emphasis retained). This mandate sets for lower federal courts the difficult, but not unfamiliar, task of assessing the gravity of offenses on a relative scale. Cf. Solem v. Helm, ___ U.S. ____, 103 S.Ct. 3001, 3011 (1983). As in other contexts, the "comparison can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender." Id.

When the information that Goodman possessed in the Moore case is projected on this screen of "comparable seriousness" alongside the information presented in the Killman report, the contrast is startling. On March 29, 1977, when Goodman referred Moore's case to the Civil Service Commission, Patterson had not yet recanted his allegations of bribery. Goodman accordingly acted under the reasonable belief that corruption threatened his department; not only police department regulations but the integrity of the legal system had possibly been violated. The reasonableness of Goodman's belief, and the gravity of Moore's suspected offense, are underlined by the simultaneous effort of the district attorney to prepare criminal prosecution of Moore. The charge against Hager and other officers for "fixing traffic tickets" simply pales when compared to the specter of a police

sergeant conspiring to commit bribery. The district court, in concluding otherwise, can only have reasoned that the Moore case was of "comparable seriousness" to the Hager case merely because the charge against Moore included in part violations of which Hager stood accused. The court thereby equated a greater offense to its lesser component offense without regard to the disparity in magnitude between the whole and the part. A fact-finding process that overlooks this crucial comparative step is clearly erroneous. Cf. Roberts v. Collins, 544 F.2d 168 (4th Cir. 1976), cert. denied, 430 U.S. 973 (1977).

(b) The Decision to Cite Moore to the Civil Service Commission

After making the initial decision to take disciplinary action against Moore, Goodman faced a choice between personally

ordering a punishment and citing Moore to the Civil Service Commission for review and possible punishment. Goodman referred the case to the Board, a course which, as the district court voted, "carried with it the possibility of significantly more severe sanctions than could be imposed by the Chief of Police." The plaintiff contended below that this decision to expose Moore to greater risk represented an act of racial discrimination by Goodman. The district court, finding a failure to refer the cases of white officers who committed violations similar to those committed by Moore, accepted that contention.

This conclusion finds no support in the record. Goodman accused Moore of four violations of four Civil Service regulations:

> (1) Rule No. 400-2: "Every member of the department shall obey the laws and ordinances

> which he is obligated to enforce," viz., Rule No. 500-7(v): "receiving bribes and money or other valuable things."
>
> (3) Rule No. 500-7(h): Goodman on four other occasions disciplined officers, all white, for "conduct unbecoming an officer" in conjunction with a related rules violation. In three of these four instances, Goodman referred the case to the Commission.
>
> (4) General Order No. 4, Section V, Paragraph A: In addition to Moore, Goodman took disciplinary action against one other officer -- a white man -- for violation of this paragraph. He referred that case to the Commission.

This evidence demonstrates by an overwhelming preponderance that the violations for which Goodman disciplined Moore were violations for which Goodman consistently cited white officers to the Civil Service Commission.

That consistency escaped notice below because the district court in its findings of fact attempted comparisons that ranged

widely through the police department code of conduct, reaching ad hoc judgments about the reprehensibility of Moore's violations relative to other officers' use of profanity, abuse of alcohol, and absence from work without leave.[3] These conclusions acknowledge no deference to the police department classification of violations, no application of the Solem v. Helm[4] criteria for comparing offenses, and

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[3] Because the district court reported its findings of fact in conclusory statements rather than detailed analyses of the evidence, we can only speculate about the specific incidents on which the court based its comparisons. We have reviewed all comparisons available from the evidence offered by the plaintiff, examples of which are given above.

[4] We recognize that Solem v. Helm involved the procedurally different case of an Eighth Amendment challenge to a state criminal sentence. Although the standard of review may change with the transition from the criminal to the civil context, the considerations relevant in Solem remain relevant when comparing offenses in private disciplinary cases.

in short, no basis whatsoever for the asserted correspondence of conduct. Without attempting to establish a single process of comparison for the vast variety of disciplinary situations, we may safely say that in this case a principled determination of "comparable seriousness" required at least initial deference to the system of offenses created by the police department, an administrative agency of the city of Charlotte.[5] The departmental scheme may of course be disregarded if arbitrary or capricious. But in here judging "similarity" without the discipline of that initial guidance and without

---

[5] This limited deference does not bring "comparable seriousness" to the level of "precise equivalence" that the Supreme Court has said to be unnecessary in Santa Fe, 427 U.S. at 283 n. 11. Conduct violative of a single police regulation may vary considerably in different cases. The other alleged violations of Rule No. 400-2, for example, involved not bribery but larceny, drug distribution, and receiving stolen goods.

the application of the Solem criteria, the fact-finding process strayed into clear error.

(c) **The Decision Not to Withdraw the Case from the Board**

Patterson retracted his allegation of bribery on May 8, 1978, after the March 29 citation by Goodman but before the June 21 decision by the Commission. As the district court noted, Goodman retained the authority to withdraw the Moore case from the Commission docket in the period between the Patterson recantation and the Commission ruling. Plaintiff argued strenuously at trial that Goodman revealed an underlying racial motive by failing to exercise this authority. In support of this argument, plaintiff relied heavily on the disciplinary case of Sergeant T. C. Johnson, a white officer. Goodman cited Johnson to the Commission for violation of

Rule No. 400-2 (failure to obey state law), and for the underlying violation of North Carolina larceny statutes. A jury acquitted Johnson of the state charges in a full criminal trial, after which Chief M. M. Vines, Goodman's successor in the Charlotte Police Department, withdrew Johnson's pending case from the Civil Service Commission and suspended him for fifteen days for conduct unbecoming an officer.

The Johnson incident, however, does not suggest disparate treatment of black officers and white officers. When criminal charges against Johnson dissolved with his acquittal, no unaffected charges remained on which the Commission could act. Chief Vines then instituted the charge of "conduct unbecoming an officer," a disciplinary sanction that the Chief of Police administered personally in all nine of the cases on the record -- involving

both black and white officers -- in which it was the only basis for action. In contrast, Moore faced citation for three rules violations notwithstanding the bribery allegation. And, as noted above, these charges by themselves routinely mandated citation to the Civil Service Commission. As the decision of Chief Vines in the Johnson case and the decision of Chief Goodman in the Moore case thus arose in very different disciplinary contexts, the disparate treatment of Johnson and Moore cannot logically support a prima facie inference of racial discrimination

(d) **The Decision to Suspend and Demote Moore**

On June 21, 1978, the Charlotte Civil Service Board exonerated Moore on the bribery charge but found him guilty of the other three rules violations. By a two to

one majority, the Board voted to suspend Moore without pay for eighty-five days and to demote him from the rank of sergeant to that of patrol officer. In reviewing this decision, the district court found as fact that white sergeants guilty of comparable violations had received less severe treatment from the Board than Moore had received. The district court concluded from this finding that Moore had raised a prima facie inference that the Board decision was motivated by racial animus.

For the reasons suggested by our discussion of the other contested decisions, we cannot accept the premise of "similarity" implicit in the finding that comparable white offenders were treated more leniently by the Board. Inspected under a principled process of analogy, the record simply reveals no comparable white offenders. Cf. Corley v. Jackson Police Department, 639 F.2d 1296, 1299 (5th Cir.

1981). The Board punished Moore for violation of Rule No. 300-20 (attempt to influence government officials for personal gain), Rule No. 500-7(h) (conduct unbecoming an officer), and General Order 4, Section V, Paragraph A (interference in the trial process). According to the evidence presented below, the Board has found no other officer, white or black, guilty of violating Rule No. 300-20 or General Order 4, Section V, Paragraph A.[6] The Board has apparently punished two white officers for violation of Rule No.

---

[6] As indicated in section III(b), the Charlotte police chief has apparently cited no other officer for violation of Rule No. 300-20. Of the three officers mentioned for their citation under the most closely analogous rule, No. 300-31, the record includes the Board finding in only one case. That officer, found guilty of violating Rule No. 300-31 and Rule No. 400-2 (failure to obey state law) was discharged from the force. The record does not indicate the Board disposition of the other incident involving an officer cited for violation of General Order 4, Section V, Paragraph A.

500-7(h). It suspended J. L. Ruckart for twenty days without pay for a single violation of the rule, and it suspended B. W. Gaddy for ninety days for two violations of the rule in conjunction with related offenses involving conduct subversive of force discipline, making a false statement, and neglecting to route seized evidence through proper channels without delay. These cases, comparable only to a part of the basis for the punishment of Moore, do not indicate that the Board disposition of his case conflicted with its disposition of cases involving white officers. If anything, the ninety-day suspension ordered in the Gaddy incident -- which in the improper custody of evidence involved a loosely related problem of interference in the criminal process -- suggests a consistent concern by the Civil Service Board with

limiting the influence of police officers in the post-arrest administration of justice.

Beyond the suspension, the district court found that "no white sergeant found guilty of a rules violation has ever been demoted by the Board." As an abstract proposition, this statement is correct. In fact, the record shows no other sergeant or higher office. white or black, to have been demoted by the Board for any cause. But then, the record also shows no other person found guilty by the Board of abusing his position in an attempt to persuade government officials to forebear prosecution of a criminal trial. Given this fact that Moore's violations were as singular as his punishment, in light of the consistent pattern of disciplinary administration with respect to the rules classifications and in light of the reasonable proportionality of this

sanction to the offenses admitted, an inference of racial intent based solely on the uniqueness of Moore's demotion is clearly erroneous.

IV

We recognize that a reviewing court need rarely address the sufficiency of a prima facie case after a full trial on the merits of a complaint. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 714 (1983). The Aikens exhortation to proceed directly to the ultimate question of discrimination vel non does not, however, apply in this case for two reasons. First, Aikens emphasizes that "where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." Id.

at 715. But here the defendant did not meet its burden of production. The evidence on which plaintiff seeks to raise an inference of racial discrimination is therefore not only relevant but crucial, for the force of that inference is the sole basis for the finding of intentional discrimination. Second, as the court observed in Burdette v. FMC Corporation, the Court of Appeals for this circuit has not adequately clarified the showing that a plaintiff need make to establish a prima facie case in a disciplinary Title VII action. 566 F.Supp. 808, 814-815 (S. D. W.Va. 1983). We do not intend here to replace that void with an exclusive mechanical model for handling these varied and delicate cases, but we do hope today to provide some guidance to the trial courts.

The essence of that guidance is that a conclusion that individuals have

received discriminatory disparate treatment may be supported only where the notion of comparability is informed by sound, articulated principles that will enable appellate courts to examine the fact-finding process. In this case, the district court found similarity among different incidents without the discipline of such reviewable principles. Because proper attention to these axes of comparison dispels any suggestion of racial animus in the challenged police decisions and because the plaintiff offered no other evidence, either direct or indirect, that even hinted at an improper motive on the part of the defendant, we must reject the inference of racial discrimination drawn by the district court as clearly erroneous.

REVERSED

[FILED: July 29, 1983]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

CHARLOTTE DIVISION

C-C-82-495-M

JACK K. MOORE, Plaintiff, -vs- CITY OF CHARLOTTE, NORTH CAROLINA, Defendant.	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Louis L. Lesesne, Jr., Gillespie & Lesesne, 980 Johnston Building, Charlotte, North Carolina 28281, counsel for plaintiff.

F. Douglas Canty, Assistant City Attorney, Charlotte City Hall, 600 East Trade Street, Charlotte, North Carolina 28202, counsel for defendants.

Before James B. McMillan, District Judge

This case was tried without a jury in Charlotte on March 29 and 30, 1983. Having reviewed the trial transcript and exhibits and having considered all of the evidence and arguments of counsel, the court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On August 25, 1982, plaintiff Jack K. Moore filed this suit against defendant, the City of Charlotte, and against the Charlotte Police Department. [By stipulation of January 19, 1983, the Charlotte Police Department was dismissed from the action.] Plaintiff alleged that defendant had discriminated against him on the basis of race in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e

et seq., the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. §§1981 and 1983.

2. Plaintiff is a black citizen of the United States and a resident of Charlotte, Mecklenburg County, North Carolina. The defendant, City of Charlotte, is a North Carolina municipal corporation.

3. Plaintiff was first employed by defendant approximately eighteen years ago. He served as a patrolman in the Charlotte Police Department until February 1973, at which time he was promoted to the position of sergeant.

4. On March 29, 1978, then Chief of Police J. C. Goodman suspended plaintiff without pay and cited him to the Charlotte Civil Service Commission ("the Board") for violation of the Civil Service Rules and Regulations. Chief Goodman alleged that plaintiff had conspired to receive a

bribe of $450.00 from Eddie Winfield Drakeford in return for arranging to driving charge against Drakeford dropped. The citation further alleged, in three additional counts, that plaintiff had improperly approached officers R. E. Cureton and D. L. Grose and asked them to attempt to get the charge against Drakeford reduced or dismissed. Plaintiff's Exhibit 3, Defendant's Exhibit 17.

5. The only evidence the Police Department had implicating plaintiff in a bribery conspiracy was an unsworn statement given by Buddy Patterson to Captain W. H. Stroud on December 16, 1977. Defendant's Exhibit 5. On May 8, 1978, under oath and in open court, Buddy Patterson admitted that his statement to Captain Stroud implicating Sergeant Moore in a bribery conspiracy was a lie. Plaintiff's Exhibit 8.

6. Although defendant had no evidence that plaintiff had done anything other than to ask two officers to try to procure lenient treatment for a friend, defendant proceeded to "prosecute" plaintiff before the Civil Service Board on the charges as originally made. The court specifically finds that:

(a) The "prosecution" before the Civil Service Board carried with it the possibility of significantly more severe sanctions than could be imposed by the Chief of Police;

(b) The Chief of Police had the power to request that allegations against plaintiff be withdrawn, in light of the evaporation of the case against plaintiff on the most serious count involved, but failed to do so; and

(c) White officers who committed violations similar to those committed by plaintiff not only were not prosecuted before the Board, but were not disciplined at all.

7. Defendant's only proffered explanation for this disparate treatment of plaintiff is that plaintiff, unlike otherwise similarly situated whites, was charged with bribery. While this fact may explain the initial decision to cite plaintiff to the Board, it does not explain why, once the bribery allegation was admitted to be false, defendant pursued the more severe disciplinary course of prosecuting plaintiff before the Board. The court finds that defendant's articulated reason for its disparate treatment of plaintiff in this regard is sham.

8. On June 21, 1978, the Civil Service Board issued its decision in plaintiff's case. It found plaintiff not guilty of receiving or conspiring to receive a bribe, but did find that plaintiff had violated the Civil Service Rules by attempting to assist Drakeford in

obtaining favorable treatment on his DUI charge. The Board ordered that plaintiff be demoted from the rank of sergeant to patrolman and that his suspension without pay from March 29 through June 21, 1978 (85 days), be made effective. Plaintiff's Exhibit 4.

9. There is no evidence that any white officer has ever been convicted and punished by the Board for rules violations similar to those committed by plaintiff. (As previously found, white officers alleged to have committed such violations have not been cited to the Board or disciplined at all.) However, a number of white police sergeants have been found guilty by the Board of violations of severity comparable to those committed by plaintiff, but have received much milder punishment than that imposed on

plaintiff. No white sergeant found guilty of a rules violation has ever been demoted by the Board.

10. Defendant has not articulated any explanation for the difference in severity of the punishment imposed on plaintiff by the Board and that imposed on white sergeants found to have violated the Civil Service Rules. [Defendant contends, rather, that it cannot be held liable for any racial discrimination committed by the Board. See infra p. 7, Conclusions of Law, ¶4.]

11. On the basis of the foregoing findings that plaintiff was prosecuted and disciplined differently by defendant than were similarly situated whites and that defendant failed credibly to articulate a legitimate, non-discriminatory reason for this disparate treatment, the court

finds that defendant intentionally discriminated against plaintiff on the basis of his race.

CONCLUSIONS OF LAW

1. The court has jurisdiction over this matter pursuant to 28 U.S.C. §1343 and 42 U.S.C. §2000e-5. The fact that plaintiff's notice of right to sue was issued by the Equal Employment Opportunity Commission (EEOC) rather than by the United States Attorney General, as apparently required by 42 U.S.C. §2000e-5(f)(1), does not, as defendant contends, deprive the court of jurisdiction over plaintiff's Title VII claim. Plaintiff complied with the procedural obligations imposed on him by the statute and was entitled to a "right to sue" notice; defendant does not claim that it was in any way prejudiced by the alleged devia-

tion from statutorily prescribed procedures. The EEOC issued the notice pursuant to its own regulations, which provide in pertinent part that:

> In all cases where the respondent is a government, govermental agency or a political subdivision, the Commission will issue the notice of right to sue when there has been a dismissal of the charge. In all other cases where the respondent is a government, governmental agency or political subdivision, the Attorney General will issue the notice of right to sue, including the following cases: (1) when there has been a finding of reasonable cause by the. Commission, there has a failure of conciliation, and the Attorney General has decided not to file a civil action, and (2) where a charging party has requested a notice of right to sue pursuant to Section 1601.28(a)(1) or (2).

29 C.F.R. §1601.28(d). [Plaintiff's charge was dismissed by the EEOC.] Regardless of whether this regulation comports with §2000e-5(f)(1), plaintiff cannot be

faulted or penalized for any error the EEOC or the Attorney General may have made in interpreting and implementing the statute. Cf., Perdue v. Roy Stone Transfer Corp., 690 F.2d 1091 (4th Cir. 1982) ("right to sue" letter not prerequisite to jurisdiction where EEOC refuses to issue letter).

2. Defendant is an employer and plaintiff is an employee within the meaning of 42 U.S.C. §2000e(b) & (f).

3. Plaintiff proved by a preponderance of the evidence that he was discriminated against by defendant on the basis of race. Defendant may not escape liability for the discriminatory discipline of one of its employees by virtue of the fact that its disciplinary process consists of a series of independent decisions by various actors. The court has specifically found that plaintiff was discriminated against at two stages of

that process -- in the decision to go forward with his prosecution and in the punishment imposed. But the most telling fact is the bottom line: a black employee of defendant was demoted and suspended for 85 days while similarly situated whites either received much lighter discipline or went unpunished.

4. Nor can defendant absolve itself of liability because it was the Civil Service Board rather than the Council which carried out the discriminatory treatment of plaintiff. The Board, whose members are appointed by the City Council, is vested under the City s charter with the authority to discipline a certain class of the City's employees (members of the police and fire departments charged with serious rules infractions). In other words, one of the City's integral functions as an employer has been in part delegated to the Board. It is irrelevant

that no other City body or agent, such as the City Council, the City Manager, or the police chief has the authority to reverse or modify the Board's decisions. When the Board acts, it acts for the City, and the City is therefore liable for the Board's unlawful discrimination. Cf., Owens v. Rush, 636 F.2d 283 (10th Cir. 1980) (county sheriff who made independent employment decisions was "agent" of the county for Title VII purposes).

5. Plaintiff is entitled to an award of costs and reasonable attorney's fees.

ORDER

IT IS ORDERED that the lawyers meet and exchange information bearing upon the relief to which plaintiff is entitled based upon the above findings and conclu-

sions, and that they advise the court by August 15, 1983, whether they can agree upon a final judgment.

This __ day of July, 1983.

JAMES B. MCMILLAN
United States District Judge

Office - Supreme Court, U.S.
FILED
MAY 21 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1660

In The
Supreme Court of the United States
October Term, 1984

MOORE,

Petitioner,

vs.

CITY OF CHARLOTTE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION

F. Douglas Canty
Assistant City Attorney
City of Charlotte
600 East Trade Street
Charlotte, North Carolina 28202
(704) 336-2254
Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 835-7427 Ext. 333

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OPINION BELOW

The decision of the Court of Appeals is reported at 754 F.2d 1100 (4th Cir. 1985).

STATEMENT OF THE CASE

In 1978, officials of the respondent's Police Department received information that the petitioner had accepted a bribe, in the form of money, to have a "driving while intoxicated" case dismissed. This information consisted of a statement by Eddie Drakeford, the defendant in the traffic case, that he paid money to Buddy Patterson for help in the case and a statement by Patterson that he paid the money to the petitioner for having the case dismissed. Neither Drakeford nor Patterson had been charged in connection with the alleged bribe at the time he made his statement.

When confronted by officials of the Police Department's Internal Affairs Division, the petitioner admitted that he knew both Drakeford and Patterson. The petitioner also admitted that he asked one of the arresting officers and another officer, Cureton, who had no legitimate involvement with the case, to "help" Drakeford in the traffic case, but he denied that he received any money. The petitioner made other statements that appeared, in light of other information possessed by Internal Affairs, to be false. The most damaging statement the petitioner made was that he first learned of the traffic case when he saw Drakeford in Court. Both Cureton and the arresting

officer stated that the petitioner mentioned the case to them some time prior to the court date.

Internal Affairs also learned that Cureton made misrepresentations to the prosecuting attorneys and discouraged witnesses from testifying in the traffic case. Cureton's efforts were successful in having the case dismissed prior to trial.

The petitioner, Patterson, and Cureton were indicted for bribery. Patterson and Cureton were tried first and acquitted. However, at this trial another officer testified that during the time period of the bribery investigation Cureton asked him what he would do if a supervisor asked him for help in a traffic case and indicated "there might be some money."

After his acquittal, Patterson disavowed his earlier statement implicating the petitioner in a bribe. Since Patterson was the only person who could link the petitioner with an exchange of money in connection with the dismissal of the traffic case, the criminal bribery charges against the petitioner were dismissed by the State.

Meanwhile, the police chief had cited the petitioner to the Civil Service Board for discipline, on charges of accepting a bribe and improperly interfering, for "personal advantage," in the prosecution of the traffic case. The Civil Service Board found the petitioner "not guilty" of accepting a bribe, but found that he did improperly interfere, mainly through Cureton, with the disposition of the traffic case. The Civil Service Board demoted the petitioner from sergeant to patrolman and suspended him.

As a result of allegations made during the bribery trial and during the Civil Service Hearing, Internal Af-

fairs conducted a thorough investigation of the disposition of traffic citations over a five year period. The investigation revealed that several officers, both white and black, including the petitioner in a matter unrelated to the bribery charge, had violated police department regulations by asking, and in some cases having, fellow police officers to dismiss or reduce charges against friends and relatives. The investigation did not reveal that any other officer had accepted a bribe or otherwise interfered with the prosecution of a case. No action was taken against any officer as a result of this investigation.

At the trial of the instant case, the petitioner contended that the police chief cited him to the Civil Service Board because of his race and that the Civil Service Board demoted and suspended him because of his race. To support those contentions, the petitioner produced documentary evidence that a number of white officers had not been cited to the Civil Service Board after having been found by the Police Department to have committed various offenses, and that some white officers had been cited to the Civil Service Board but had not been demoted or suspended by the Board.

The respondent submitted documentary evidence that white officers suspected of having committed infractions less serious than bribery had been cited to the Civil Service Board, that white officers had been dismissed from the Police Department by the Board, and that black officers received more lenient discipline than white officers who had committed the same types of infractions as those committed by the black officers.

———o———

SUMMARY CF ARGUMENT

The Court of Appeals did not overturn credibility determinations of the trial judge, because the evidence consisted, in virtually its entirety, of documents of unquestioned authenticity, the contents of which either were not in dispute or were without question accurate accounts of statements made by various persons.

The Court of Appeals correctly applied the "clearly erroneous" standard of appellate review contained in Rule 52(a) of the Federal Rules of Civil Procedure.

———o———

ARGUMENT

The evidence produced in the trial court was virtually all documentary. Both parties produced documents describing rules violations allegedly committed by police officers and the disposition of charges brought against those officers. While there was some disagreement as to the inferences to be drawn from the contents of some of those documents, neither party questioned the accuracy of those contents. The respondent put forth the information it gathered in its investigation of the bribery allegation against the petitioner. This information was all documentary, with the witness testifying only that the documents were received or made during the investigation. The petitioner denied the truthfulness of some of this information, but he did not deny that it was gathered by the respondent. Since the issue was whether the respondent had sufficient evidence to institute disciplinary proceed-

ings against the petitioner, not whether the petitioner was in fact guilty of the charges, the petitioner's protestations against the truthfulness of the evidence were immaterial and, hence, did not create any credibility issue.

Thus, there were no credibility determinations to be made by the trial court. Decision in the case required only a comparison of the allegations, findings, and punishments in all the disciplinary actions and a determination of whether that comparison would support a reasonable conclusion that the petitioner was treated more harshly than similarly situated white officers. The trial court found, in essence, that the documents showed the petitioner to have been punished more harshly by the respondent than white officers who committed violations of "comparable severity," and that the respondent had not articulated any explanation for the difference in treatment.

The Court of Appeals, after an examination of the individual discipline cases, held that the trial court's findings "rest on an unprincipled conception of 'similarity' and 'comparability,' a structural flaw that renders the fact-finding process 'clearly erroneous' under the reasoning of *Miller v. Mercy Hospital*, 720 F.2d 346, 361 (4th Cir. 1983)." (Petition, 20a.)

The Court of Appeals' decision, therefore, was not based upon a review of the trial court's credibility determinations, but upon a "principled" examination of unchallenged documentary evidence.

The reasoning of *Miller v. Mercy Hospital, supra*, is founded upon the decision in *United States v. United States Gypsum Co.*, 333 U.S. 364, 68 S. Ct. 525, 92 L.Ed.

746 (1948), where it is stated that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." 333 U.S. at 395, 68 S. Ct. at 541. The Court of Appeals found the record to be devoid of any direct or circumstantial evidence of discriminatory intent on the part of the respondent; consequently, a "definite and firm conviction" that the trial court had made a mistake was inescapable.

Anderson v. City of Bessemer City, 470 U.S. —, 106 S. Ct. —, 84 L.Ed. 2d 518 (1985), in many ways is inapposite to the instant case. A major feature of *Anderson* was the Court of Appeals' "failure to give due regard to the ability of the district court to interpret and discern the credibility of oral testimony." 84 L.Ed. at 531. Where credibility determinations are involved, "Rule 52 demands even greater deference to the trial court's findings . . ." 84 L.Ed. 2d at 529. Very pertinent to our case, however, is the statement:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the Court of Appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. [Citations omitted.]

A conviction of the implausibility of the district court's account of the evidence is imbodied, surely, in the Court of Appeals' conclusion that the petitioner did not present even a prima facie case of discrimination. It is evident, then, that the Court of Appeals correctly applied the "clearly erroneous" standard.

The situation presented in *Hunter v. Underwood*, No. 84-76, — U.S. —, 53 L.W. 4468 (1985), is more closely analogous to the instant case. There, where the issue was whether a provision of the Alabama constitution was adopted with the intent to discriminate against black persons, the evidence consisted of records of the proceedings of the constitutional convention, historical studies, and the testimony of historians, all of which was offered and received without objection. The district court found that the constitutional provision was not adopted with racial motives, but the Court of Appeals found that discriminatory intent was a motivating factor. This court affirmed the judgment of the Court of Appeals, and in doing so approved the Court of Appeals' thorough review of the record and its application of the clearly erroneous standard of review, which " 'left [the court of appeals] with a firm and definite impression of error . . . with respect to the issue of intent.' " 53 L.W. at 4470.

The first two errors committed by the district court in the instant case were its findings of fact numbered 5 and 6 (Petition, 42a, 43a). The court, in finding that "The only evidence the police department had implicating plaintiff in a bribery conspiracy was an unsworn statement given by Buddy Patterson," and that, after Patterson recanted his statement, "defendant had no evidence that plaintiff had done anything other than to ask two officers to try to procure lenient treatment for a friend," seemingly held that the respondent, even for administrative purposes, was required to accept the petitioner's version of his actions and ignore several other facts:

1. that Patterson ever made the bribery statement;

2. the drunk driving defendant's statement that he paid Patterson to take care of the case and his mention of the petitioner as he came very close to offering a bribe to the arresting officers;

3. that the petitioner, who had no legitimate interest in the drunk driving case, requested another officer, Cureton, who also had no legitimate interest in the case, to interfere in the prosecution;

4. the petitioner's responsibility for Cureton's false statements to two district attorneys and his telling one witness not to go to court and the other witness to leave the court house;

5. the testimony of another officer that Cureton discussed a bribe with him;

6. that the petitioner and Cureton lied to Internal Affairs about their involvement in the drunk driving case.

There is no dispute that the Police Department possessed all this evidence; the district court's finding that none of it could be considered against the petitioner in administrative proceedings is a mistake. This mistake tainted the remainder of the district court's findings, because it formed the basis of that court's comparison of the petitioner's offense with offenses committed by white officers who were not cited to the Civil Service Board.

With regard to the district court's comparison of the offenses committed by various officers, it would appear that the district court, rather than reviewing the undisputed documentary evidence, relied upon the petitioner's misleading characterizations of the offenses committed by white officers. The petitioner persists in that practice

in this court. On page 16 of the petition, the petitioner describes some offenses committed by white officers. One offense is "possession of heroin" according to the petitioner; the evidence is that the officer neglected to promptly turn over heroin that had been seized from a suspect. The heroin was in the officer's file drawer at the Police Department. There was no allegation or finding that the officer criminally possessed the heroin, a conclusion that the petitioner's description might lead one to reach.

One offense is described by the petitioner as "suggesting bombing of building." The evidence, however, is that the officer said that if he had his way, he would bomb a building. The comment was made a context which caused those who heard it to consider it a joke.

The petitioner describes another offense as "compelling man to pay prostitute." When all the evidence concerning this incident is reviewed, it is clear that the officer at worst proposed that the man pay the prostitute to compensate her for injuries she received when she jumped from the man's car, this according to the statement that the man in question gave to the police. Neither the man nor the prostitute stated that they engaged together in any sex act.

The petitioner also misstates a portion of the Court of Appeals' opinion. In footnote 3, page 15, the petition states that "The Fourth Circuit itself conceded that one of those whites had violated police regulations by voiding two traffic tickets for friends and by fraudulently securing prosecutorial dismissal of one traffic case." The opinion actually says, "Hager, according to plaintiff's interpretation of the evidence, had violated police regula-

tions by voiding two traffic tickets for friends and by securing prosecutorial dismissal of one traffic case." The court went on to state, "the charge against Hager and other officers for 'fixing traffic tickets' simply paled when compared to the specter of a police sergeant conspiring to commit bribery. [There was no allegation that Hager had accepted a bribe.] The district court, in concluding otherwise, can only have reasoned that the *Moore* case was of 'comparable seriousness' to the Hager case merely because the charge against Moore included in part violations of which Hager stood accused." (Petition, 23a, 24a).

The petitioner puts forth as "critical subsidiary factual findings" the district court's findings that "white officers who committed violations similar to those committed by plaintiff not only were not prosecuted before the board, but were not disciplined at all" (Petition, 43a) and that "[a] number of white police sergeants have been found guilty by the board of violations of severity comparable to those committed by the plaintiff, but have received much milder punishment than that imposed on plaintiff." (Petition, 45a, 46a). The record reveals that the white officers who were not cited to the board committed the following offenses: being absent from work without permission; failing to follow the proper procedure for reporting out sick; directing offensive language toward citizens; the previously mentioned case in which the officer assisted the prostitute in collecting money for injuries she received; associating with the operator of a gambling house; consuming alcoholic beverages while off duty, attempting to conceal the nature of an injury to an out-of-town police officer, and going to sleep in the hos-

pital emergency room, all in one incident; operating a police vehicle after having consumed alcoholic beverages and later walking along a street in an intoxicated condition; while off duty, transporting an unauthorized person in a police vehicle; incorrectly reporting the amount of damage to a private vehicle involved in an accident; accidentally transmitting profane language over the police radio; and performing work for another employer while on police duty.

All of the officers involved were disciplined, but none was exposed to the possibility of harsher punishment before the Civil Service Board. A finding that the offenses involved are similar to accepting a bribe, the offense for which the petitioner was cited to the board, is incomprehensible and clearly erroneous, as the Court of Appeals found.

It should also be noted that black officers who committed offenses such as these were not cited to the board, either, and that white officers were cited to the board for the following offenses: altering a document posted on a police department bulletin board and making a false statement; making a false statement, filing a false report, allowing a subordinate to work another job while on duty, neglecting to turn in seized property, and disobeying a direct order, all against one officer; reporting for duty with a blood alcohol level of .07 percent; ordering that no report be made of an accident involving a police vehicle; directing offensive, indecent, and profane language to a citizen and being intoxicated while off duty; and requesting a District Attorney to have bond set for a murder suspect and helping the suspect to be released from jail to visit his parents.

Then there is the case of Hager, the white officer who was among the officers who were the subjects of the "ticket fixing" investigation, none of whom was disciplined. The investigation showed that Hager had improperly requested another officer to void speeding tickets issued to two persons who were acquainted with Hager's wife and had followed proper procedures in requesting the voiding of a traffic ticket that had been issued to a "police informant." At trial, the petitioner attempted to show that Hager gave his superior false information in the "informant" case and produced a newspaper article to that effect; but Killman, the investigating officer, testified that he did not know of the possibility of false information. Hager's offense is simply not "comparable" to accepting a bribe.

The only evidence before the district court pertaining to the Civil Service Board's discipline of white officers was as follows: A sergeant was suspended for thirty days for causing two subordinate officers to work for private employers a total of 6.5 hours while the subordinate officers were on duty; a sergeant was suspended for ten days and placed on probation for one year for reporting to work with a blood alcohol level of .07 percent; a sergeant was suspended for ten days for ordering his subordinates to delay filing a report of a police vehicle running over a dead body; a sergeant was suspended for twenty days for being intoxicated while off duty and engaging in an altercation with a motorist; two officers who committed crimes were discharged (this renders meaningless the district court's finding that "no white sergeant found guilty of a rules violation was ever demoted by the board").

The Civil Service Board found that the petitioner, "for purely personal gain," caused Cureton to take his reprehensible actions. The evidence concerning the board's disposition of charges against white officers simply does not support a finding that "white police sergeants have been found guilty by the board of violations of severity comparable to those committed by the plaintiff, but have received much milder punishment than that imposed on plaintiff."

CONCLUSION

For the reasons stated above, the court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

F. Douglas Canty
Assistant City Attorney
City of Charlotte
600 East Trade Street
Charlotte, North Carolina 28202
(704) 336-2254

Attorney for Respondent

No. 84-1660

(3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JACK K. MOORE,

Petitioner,

v.

CITY OF CHARLOTTE, etc., *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

LOUIS L. LESESNE, JR.
Gillespie & Lesesne
Suite 980
United Carolina Bank Building
212 South Tryon Street
Charlotte, North Carolina 28281
(704) 372-5700

J. LEVONNE CHAMBERS
RONALD L. ELLIS
ERIC SCHNAPPER*
NAACP Legal Defense &
Educational Fund, Inc.
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

Counsel for Petitioner

*Counsel of Record

7 pp

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On Petition For Writ Of Certiorari To
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PETITIONER'S REPLY BRIEF

The question presented by this case is not, as respondent suggests, whether a Court of Appeals, applying the standard announced in Anderson v. Citv of Bessemer City, might have ruled for respondent. The Court of Appeals, writing in January

1985 prior to the decision in Anderson, did not and could not have applied the Anderson standard, but was necessarily utilizing the Fourth Circuit approach criticized in Anderson itself. The issue here is whether, by vacating and remanding its pre-Anderson decision, this Court will afford petitioner an opportunity to have his claim decided by an appellate court clearly applying the correct legal standard.

Simple fairness dictates that petitioner be afforded such a hearing. In Memphis Firefighters v. Stotts, 81 L.E.2d 483 (1984), the mere possibility that a few white firefighters might some day be temporarily laid off due to lost seniority led this Court to entertain and decide Title VII issues of considerable difficulty. In the instant case the injury to petitioner is not a matter of speculation;

he was suspended for longer than any of the whites in Stotts, and has in fact, been permanently demoted. If petitioner's Title VII claims are to be rejected, that should be only after those claims have been weighed by the correct legal standards, not because petitioner had the ill fortune to have his case decided 50 days prior to, rather than, 50 days after the decision in Anderson.

A remand is particularly appropriate because respondent quite deliberately declined to defend or even refer to the mistaken factual theory on which the Fourth Circuit decision was based. As we noted in our petition the Court of Appeals grounded its analysis on a factual theory neither advanced by respondent nor presented to the trial court -- that the gravity of an alleged infraction was to be measured by the section of the City

regulation invoked, not by the actual substance of the purported misconduct. Since no witness ever articulated at trial any such explanation for the suspension and demotion of petitioner, respondents properly declines to argue that the treatment of petitioner could be upheld on the Court of Appeals' theory. The factual contentions pressed in this Court by respondent clearly warrant consideration on remand, but they simply are not the basis on which the Court of Appeals acted.

Respondent insists that even under the standards announced in Anderson the district court committed clear error. We do not ask this Court to resolve that question, or to reject on the merits the respondent's contentions. We ask only that this Court remand this case to the Fourth Circuit and thus afford to both petitioner and respondent an opportunity

to present their arguments regarding the applicability of Anderson to the particular circumstances of this case.

CONCLUSION

For the above reason the Court should grant the petition, vacate the decision of the court of appeals, and remand the case for further consideration in light of Anderson v. City of Bessemer City.

Respectfully submitted,

LOUIS L. LESESNE, JR.
Gillespie & Lesesne
Suite 980
United Carolina Bank Building
212 South Tryon Street
Charlotte, North Carolina 28281
(704) 372-5700

J. LeVONNE CHAMBERS
RONALD L. ELLIS
ERIC SCHNAPPER*
NAACP Legal Defense & Educational Fund, Inc.
16th Floor